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# 87-5170

CASE NUMBER 87-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN C. McCULLOCH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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On Writ of Certiorari to the United States Circuit Court of Appeals, Eleventh Circuit

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION FOR REVIEW

WHETHER CONVICTIONS FOR PARTICIPATION IN A RACKETEER INFLUENCED AND CORRUPT ORGANIZATION (RICO), AND RICO CONSPIRACY, MAY STAND IN LIGHT OF SUBSEQUENT VACATION OF CONVICTIONS OF THE PREDICATE ACT CRIMES UPON WHICH THE TWO RICO CONVICTIONS MAY HAVE BEEN BASED, AND WHERE THERE WAS NO SPECIAL JURY VERDICT INDICATING UPON WHICH PREDICATE ACTS THE JURY RELIED IN FINDING GUILT ON THE RICO AND RICO CONSPIRACY CHARGES.

## PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

Besides the Petitioner and Respondent, other co-defendants in the original criminal convictions were parties to the proceedings in the Court from which review is here sought (the Eleventh Circuit Court of Appeals). Those individuals are Messrs. George Washington Cooper, III, Jerry Herbert Jones, and Ferrol "Bud" McKinney.

## OPINIONS BELOW

The Opinion of the Eleventh Circuit herein is not reported as yet, but appears at pages 1 through 2 of the Appendix hereto. That Opinion specifically incorporates the Opinion of the District Court from which the appeal to the Court of Appeals was taken. The District Court Opinion appears in Cooper v. United States, 639 F. Supp. 176 (M.D. Fla., 1986).

## JURISDICTION

The judgment below was entered on June 8, 1987. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).



## STATUTES INVOLVED

This action involves convictions relating to prohibited activities involving Racketeer Influenced and Corrupt Organizations (RICO) as defined in 18 USC §1962(c) and (d), which necessarily incorporate the definition of "racketeering activity" as contained in 18 USC §1961(1) and (5). Those statutes read, in relevant part:

> "§1962. Prohibited Activities.
>
> "(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> "(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section."
>
> "§1961. Definitions.
> As used in this chapter--
>
> "(1) 'racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to probibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor

vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffick), (c) any act which is indictable under title 29, United States code, section 186 (deaing with restrictions on payments and loans to labor organizations), or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;"

"(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;"





## STATEMENT OF THE CASE

The Petitioner, John C. McCulloch (hereinafter "the defendant"), was originally indicted by the United States of America (hereinafter "the government") in a 78-Count Indictment involving 18 defendants. The specific charges against him were for one count of engaging in a conspiracy to join a Racketeer Influenced and Corrupt Organization (RICO); one count for a substantive RICO violation; six counts of Interstate Transportation of Stolen Property (ITSP); five counts of wire fraud; and one count of conspiracy to infringe the copyrights in various sound recordings.

Subsequently, defendant filed a Motion to Dismiss the Indictment. The Motion to Dismiss alleged, inter alia, that Counts 4 through 9 (Interstate Transportation of Stolen Property - ITSP) should be dismissed for the fundamental reason that violation of another's copyrights could not form the basis for the prosecutions under the ITSP statute, but instead should be alleged as violations of the Federal Copyright Act.

This Motion to Dismiss has significance with regard to the RICO conspiracy and substantive RICO allegations, as well, because the ITSP charges were alleged as "predicate act" crimes in the two RICO charges, pursuant to 18 USC §1961(1)(B). The prosecutor admitted that "under the government's theory, it is the aggregation of sounds (taken in violation of the copyright laws), not the tangible phono record itself, that constitutes the stolen 'goods, ware, merchandise.'" He further asserted that "criminal copyright infringement, whether it be sound recordings, films or other artistic or literary merchandise, may be the underlying crime in a §2314 violation." Nonetheless, the Motion to Dismiss was denied by the trial Court with an Opinion.

After matters unrelated hereto, the case proceeded through the presentation of evidence and then to the charge of the jury. One instruction advised the jury that it could convict the defendant under Count I (RICO conspiracy) if it found, in part, that he had agreed to the commission of at least two of any of the predicate offenses in Counts 4 through 9 (ITSP) or Counts 20 through 24 (wire fraud). The jury was also advised that it could convict the defendant on the RICO charge if it found he committed any two of the ITSP or Wire Fraud offenses and as such conducted, or participated in, a racketeering enterprise with which he was associated.

Thereafter, the jury returned a verdict of guilty against Mr. McCulloch on all counts charged. This included a general verdict of guilt as to the RICO conspiracy and RICO charges without any indication as to whether the jury found that the defendant had agreed to commit wire fraud, or had committed any wire fraud crimes as part of his participation in, or conduct of, a racketeering enterprise. The defendant also was never charged with, nor found guilty of, wire fraud conspiracy. There was simply no indication that the jury found he had agreed to commit wire fraud or performed it as a part of the enterprise.

Subsequently, this defendant filed Motions for Arrest of Judgment and for New Trial, which Motions were denied. The defendant alleged, inter alia, that the verdict was contrary to the law and evidence. Thereupon a judgment and commitment as to all counts against Mr. McCulloch was entered, and the defendant timely filed his Notice of Appeal.

The Eleventh Circuit Court of Appeals denied the direct appeal from the convictions, essentially finding only that an individual could properly be convicted for the interstate



transporation of stolen property based upon copyright violations such as those which occurred here. United States v. Drum, 733 F.2d 1503 (11th Cir. 1984). This Court subsequently denied certiorari in the case at 105 S.Ct. 543 (1984).

After the foregoing, this Court issued its opinion in Dowling v. U.S., 473 U.S. ____, 105 S.Ct. 3127, 87 L.Ed. 2d 152 (1985). That case held, contrary to the prior rulings of the District Court and the Court of Appeals here, that copyright violations could not form the basis for ITSP convictions.

Based upon Dowling, the defendant filed a Motion under 28 USC §2255 to vacate and set aside his convictions. The District Court granted the Motion with regard to his convictions for the Interstate Transportation of Stolen Property, but denied the Motion as it related to the RICO and RICO conspiracy convictions. Cooper v. United States, 639 F.Supp. 176 (M.D. Fla., 1986). The defendant was then resentenced to the same aggregate sentence he had originally received.

Appeal was then taken to the Eleventh Circuit with regard to the aspects of the relief sought in the §2255 Motion which were denied. That court denied the appeal, and adopted the Opinion of the District Court in doing so. [Appendix, pp. one and two].

## REASON FOR GRANTING THE WRIT OF CERTIORARI

THE CIRCUIT COURT OPINION BELOW IS IN DIRECT AND EXPLICIT CONFLICT WITH AN OPINION OF ANOTHER CIRCUIT COURT REGARDING RACKETEER INFLUENCED AND CORRUPT ORGANIZATION CASES, AND IN CONFLICT WITH THE REASONING IN OPINIONS OF THIS COURT AND ANOTHER FOUR CIRCUIT COURTS.

In United States v. Brown, 583 F. 2d 659 (3d Cir., 1978), Cert. Den. 440 U.S. 909, 99 S. Ct. 1217, 59 L.Ed. 2d 456 (1979), two defendants were charged with one count of operating a business through a pattern of racketeering activity, and one count of conspiracy to commit that offense. Of course, the relevant racketeering statute, 18 USC §1961(5), defines a pattern of racketeering activity as requiring at least two predicate acts of racketeering activity as further defined in §1961(1). The defendants were also charged with four separate crimes which are racketeering acts within the statutory definition. The trial court charged the jury that a finding of guilt under any two of the substantive counts could support convictions under the RICO and RICO conspiracy counts.

At trial, the defendants were convicted on all four of the predicate counts, as well as the two RICO counts. On appeal, however, two of the predicate convictions were reversed for insufficiency of evidence. The Third Circuit ruled, therefore, that the RICO and RICO conspiracy convictions must also be reversed. Its reasoning was that it would be impossible to determine upon which two substantive counts the jury relied in returning a guilty verdict on the two RICO charges. In other words, though the defendants were still convicted of two counts of substantive offenses which could have formed the basis for the RICO convictions, the Appellate Court could in no way determine if the jury believed the defendants operated their business through a pattern of racketeering activity consisting of these two crimes, much less that they had a separate agreement to do so.



The relevant facts in the case from which review is here sought are identical, but the result was exactly the opposite. This defendant was charged with one RICO and one RICO conspiracy count, and six counts of interstate transportation of stolen property and five counts of wire fraud. The jury was instructed that it could rely on any two of the ITSP or wire fraud counts to convict on the RICO and RICO conspiracy charges. The defendant was convicted of all of the predicate offenses, but all of the ITSP convictions have now been vacated because the original Indictment failed to allege a crime as to those charges. However, the District Court refused to vacate either the RICO or RICO conspiracy charges, and the Circuit Court adopted that opinion. The District Court specifically stated in its Opinion, though, that if the Brown rationale were applied to this cause, "It seems clear ... this Court would be required to set aside petitioner's RICO convictions." Cooper v. United States, 639 F.Supp. 176, 181 (M.D. Fla., 1986). The Court declined to apply Brown, however, because of other precedent within the Eleventh Circuit.

The Opinion in Brown and other similar cases, though, has its genesis in the sound reasoning of this Court as contained in Stromberg v. California, 283 U.S. 359, 75 L.Ed. 1117 (1930). There, a defendant was charged with one count of criminal activity under a statute that proscribed three types of conduct. Though only one crime was charged, it was alleged that the defendant had committed violations under all three clauses of the statute. The jury was instructed that they could return a verdict of guilt with respect to conduct violating any one of the three clauses, and it returned a guilty verdict. The verdict, though, did not specify the clause or clauses upon which it rested. This Court subsequently found the proscription under one of the clauses to be unconstitutional, and accordingly vacated the conviction because

the Court declined to speculate as to whether the jury had relied only on activity violating that clause subsequently found to be unconstitutional to return its verdict.

Brown, supra, also evolved from a line of earlier cases within the Third Circuit applying similar reasoning. United States v. Tarnopal, 561 F. 2d 466 (3d Cir., 1977) (similar ruling in a conspiracy case).

Other Circuits, under similar facts, have arrived at the same results as would this Court and the Third Circuit upon the foregoing rationale. In United States v. Irwin, 654 F. 2d 671 (10th Cir., 1981), the defendant was charged with conspiracy and three other types of substantive offenses. The conspiracy charge incorporated the substantive offenses. Again, the jury was instructed that as to the conspiracy count it could rely upon alternate substantive offenses for conviction. Certain substantive charges failed on appeal as a matter of law, and the conspiracy conviction was also vacated because the Court would not speculate as to in which offenses the jury felt the defendants actually conspired.

In United States v. Kavazanjian, 623 F. 2d 730 (1st Cir., 1980), defendants were charged with substantive offenses relating to different types of encouraging or inducing unlawful entry of aliens into the country. They were also charged with conspiracy to commit the same. A similar jury instruction was given, and some of the substantive convictions were vacated because the Indictment, as here, did not state a crime as to them. The conspiracy convictions were, accordingly, also vacated.

In United States v. Carman, 577 F. 2d 566 (9th Cir., 1978), the Court stated under similar facts where the jury had again been told the conspiracy could rely on any one of multiple substantive offenses alleged:



> "If the jury, when considering the conspiracy count, focused only on the crime embodied in the subsequently overturned substantive crime conviction, the conspiracy conviction also should be overturned. Of course, if it focused on other crimes as well, the conspiracy conviction should be sustained. The one-is-enough charge makes it impossible to know precisely what the jury considered. Not knowing, a reviewing court must overturn the conspiracy conviction. Criminal sanctions cannot rest on what an appellate court thinks the jury would have done had the issues put to it been framed differently."

Id., at 567-568.

Finally, in Van Liew v. United States, 321 F.2d 664, 672 (5th Cir., 1963) a conspiracy conviction was likewise overturned when a portion of the conspiracy count was held to not set forth illegal objectives and a guilty verdict was general.

The Opinion of the Eleventh Circuit herein is very directly and specifically in conflict with the Opinion in United States v. Brown, 583 F. 2d 659 (3d Cir., 1978). It is also in conflict with the reasoning of all the other cases cited herein. When a jury is instructed that it may return a verdict of guilt on a RICO charge based on a finding that a defendant committed two or more of many alleged predicate acts, and it returns such verdict without indicating upon which predicate acts it relied, it is impossible to know if it convicted solely on legally deficient allegations. The problem is exacerbated in a RICO conspiracy situation because one not only cannot know which acts the jury believed the defendant committed as a part of the enterprise, but also cannot know which acts they believed he agreed to commit in furtherance thereof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished to:

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